IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 363 of 1991

with

CRIMINAL APPEAL No 364 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

AFFULON ASSOCIATE

Appearance:

1. Criminal Appeal No. 363 of 1991
   MS.HARSHA DEVNANI A.P.P. for Petitioner
   MR DG CHAUHAN for Respondent No. 1, 2

2. Criminal AppealNo 364 of 1991
   MS.HARSHA DEVNANI A.P.P.for Petitioner
   MR DG CHAUHAN for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 17/03/2001

COMMON JUDGEMENT

1. These two Criminal Appeals have been filed by the State of Gujarat under Section 377 of the Code of Criminal Procedure, 1973 for enhancement of punishment inflicted by the learned Chief Metropolitan Magistrate, Ahmedabad in two criminal complaints being Criminal Case Nos.32/91 and 33/91 dated February 14, 1991.

2. The facts leading to these two appeals may be briefly stated as follows :-

2.1. The original complainant being the Government Labour Officer and Payment of Gratuity Inspector, Ahmedabad had visited the factory of the present respondents. Certain irregularities were noticed and therefore he had issued show-cause notice to the respondents showing the irregularities noticed by him during his visit to the said factory on 12.6.1989. It seems that the respondents submitted a reply on 2.8.1989 to the said officer showing that the irregularities noticed by him have been rectified thereafter. The said officer filed the aforesaid two complaints before the learned Chief Metropolitan Magistrate, at Ahmedabad on 1.1.1991. Both the complaints were registered before him being Criminal Case Nos.32/91 and 33/91. The complaints were registered and summons was issued to the respondents herein. The respondents appeared before the Trial Court and their plea was recorded. The respondents pleaded guilty to the aforesaid charges. The learned Magistrate accepted the said plea of guilt of the respondents and convicted the respondents for the offences punishable under Section 9 (2) of the Payment of Gratuity Act, 1972. Accordingly, the learned Magistrates passed an order for payment of fine of Rs.150/- against the respondents. The respondents have paid up the amount of fine and there the matter ended.

3. Feeling aggrieved by the said quantum of amount of fine, the State of Gujarat through the Government Labour Officer and Payment of Gratuity Inspector has preferred these appeals before this Court. It has been mainly contended here that there is a provision for inflicting minimum punishment which has been totally ignored by the learned Magistrate while imposing a mere fine of Rs.150/-. It is also contended that the amount of fine is meager and looking to the gravity of the charges levelled against the respondents the learned Magistrate ought to have inflicted atleast not less than minimum amount of punishment provided by law. That by not doing so the learned Magistrate has committed serious

error in law and therefore the present appeal may be allowed; the orders of fine recorded by the learned Magistrate be set-aside and the Court should pass appropriate order of punishment in accordance with law.

4. The appeals were admitted and notices were issued to the respondents. Mr.D.G. Chauhan, learned counsel appears on behalf of the respondents. I have heard the arguments advanced by the learned Additional Public Prosecutor Ms.B.G.Devani and Mr.D.G.Chauhan, learned advocate appearing on behalf of the respondents in both the matters and have also perused the papers. The learned A.P.P. has drawn my attention to the provisions made under Section 9 (2) of the Payment of Gratuity Act, 1972 (for short the 'Act'). The said provisions may be reproduced for ready reference as follows :-

"9 (2) An employer who contravenes, or makes default in complying with, any of the provisions of this Act or any rule or order made thereunder shall be punishable with imprisonment for a term [which shall not be less than three months but which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees, or with both;

Provided that where the offence relates to nonpayment of any gratuity payable under this Act, the employer shall be punishable with imprisonment for a term which shall not be less then [six months but which may extend to two years] unless the Court trying the offence, for reasons to be recorded by it in writing, is of opinion that a lesser term of imprisonment or the imposition of a fine would meet the ends of justice".

5. On referring to the said provision the learned A.P.P. has argued that though there is a provision for inflicting minimum punishment, the learned Magistrate has totally ignored the said provision and has inflicted a meager amount of fine of Rs.150/-.

6. Now it is very clear that Section 9 (2) of the Act provides for punishment with respect to the offences enumerated therein. There can not be any dispute about the same. However, the Section further provides for the punishment which shall not be less than three months but which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to

twenty thousand rupees, or with both.

7. This means that a provision has been made for inflicting minimum punishment. Now this is not a law in which the discretion has been given to the Magistrate for inflicting a punishment less than the minimum punishment provided therein. If the Magistrate is satisfied that there is good and sufficient ground for inflicting punishment less than the punishment provided as minimum punishment in law. In other words the Magistrate has no power, discretion or jurisdiction to impose a punishment less than the minimum punishment provided in law. Apparently, the learned Magistrate considering the aforesaid complaint in these two appeals has committed serious error in law in not inflicting minimum punishment provided in Sub-Section 2 of 9 of the Act. It is to be seen that the learned Magistrate has not even applied his mind with respect to the quantum of punishment to be awarded to the present respondents. I have gone through the record. I have also gone through the order of the learned Magistrate. I find from the records and proceedings that there is not an iota of evidence which would show that the learned Magistrate has applied his mind with respect to the quantum of punishment to be awarded to the respondents while passing order of payment of fine of Rs.150/-. There is also non application of mind with respect to the provision mentioned in the Act for imposition of minimum punishment.

8. In above view of the matter it is apparently clear that the order of fine imposed by the learned Magistrate is totally against the mandatory legal provisions contained in Sub-Section 2 of Section 9 of the Act providing for minimum punishment. In other words the punishment awarded by the learned Magistrate, is less than the minimum punishment provided in law. Therefore the order of fine recorded by the learned Magistrate is contrary to the express provisions of law. The learned Magistrate had absolutely no authority, power, discretion or jurisdiction to inflict a punishment less than the minimum provided in law. It therefore becomes clear that the order of the learned Magistrate, on face of it, is illegal and not sustainable.

9. On the other hand, the learned Advocate appearing for the respondents has also argued that the original complainant had told the present respondents that if they pleaded guilty, then they will be awarded lighter punishment; that they were also told that if they did not plead guilty, then they may be arrested and they may be required to attend the Court on several occasions. It

was also told that the punishment which may be subsequently awarded may be on much higher side. That on account of the aforesaid versions conveyed to them by the original complainant, the respondents did not contest the matter but admitted the offences at the first instance. The learned advocate appearing for the respondents has therefore argued that it is a clear case of plea bargaining with a further case that there was a provision for minimum punishment which was not known to the respondents and it was not known made to them either by the complainant or by the learned Magistrate, when their plea was recorded. That there was some sort of misunderstanding with respect to the provisions of law in the mind of the respondents. It is also his argument that had there been a knowledge of the respondents with respect to the provisions of minimum punishment then the respondents would not have agreed to plead guilty to the charges levelled against them. It is also his argument that both the complaints filed by the original complainant were time barred, in view of the provisions made under Section 468 (2) of the "Code". It is further contended by him that the irregularities noticed by the original complainant on 12.6.89 were rectified by respondents on or before 2.8.89 and the compliance was reported to the original complainant by letter dated 2.8.89. That the complaint has been filed about the same after the said event. It is also argued by Mr.Chauhan that the aforesaid aspects were also required to be considered by the learned Magistrate, but since there was no trial, the facts could not be placed on record and therefore serious injustice would be caused to the respondents if the present appeals are allowed and minimum punishment is awarded to the respondents in accordance with the provisions made in Sub-section 2 of Section 9 of the Act. It is therefore his argument that the appeals may be dismissed on the aforesaid consideration. In the alternative, it is his argument that in case the Court is not inclined to dismiss the appeals on the aforesaid ground itself then in that event both the matters may be remanded and the learned Magistrate may conduct fresh trial beginning from the stage of recording of plea.

10. I have given my thoughts to the aforesaid submissions made by Mr.Chauhan on behalf of the respondents. I have also given my thoughts to the argument advanced on behalf of the appellants by the learned A.P.P. for the enhancement of punishment. Even the learned A.P.P. has also shown certain decisions of the Honourable the Apex Court wherein also the matter came to be remanded for fresh trial. It would therefore

be appropriate to consider those authorities also while dealing with the subject. The learned A.P.P. has drawn my attention to the decision of Jivanbhai Patel v. State of Gujarat reported in (1997) 10 S.C. case 329. There the offence was one punishable under Section 92 of the Factories Act, 1948. The Honourable the Supreme Court has observed that the Trial Court was not justified in imposing a fine of Rs.750/- while convicting the appellant on his plea of guilt. She has also referred to a decision of the Honourable the Supreme Court in Kirpal Singh v. State of Haryana reported in (1995) 5 S.C. case 649. There it has been observed that neither the Trial Court nor the High Court has the jurisdiction to bypass the mandatory provisions of law for minimum punishment on the basis of a plea bargaining. Almost same view was expressed in a case of State of Uttar Pradesh v. Chandrika reported in (1999) 8 S.C. case 638. Apart from the aforesaid it is not open to any Court to impose a punishment which is less than minimum punishment provided in law. The punishment inflicted by Court less than the minimum punishment provided in law would amount to bypassing the express provisions of law which is totally impermissible. However, a plea bargaining case has again been set out by the learned advocate for the respondents. Time and again this Court has reiterated that it is highly improper to act upon plea bargaining. It is true that in the present case the Court has not been involved or the present respondents have not involved the Court in the said issue of plea bargaining. The respondents have come out with a case that the original complainant has come a suggestion that if offences are admitted then the respondents would be put to a very light punishment. The respondents have not merely made this statement orally before the Court as aforesaid. The respondents have also filed an affidavit duly sworn by one of the respondents clarifying the aforesaid aspects.

11. In view of the aforesaid affidavit on record it becomes clear that the respondents had not contacted any advocate. They have pleaded guilty on the very first date and the learned Magistrate has not recorded any reason for imposing a particular amount of fine on the respondents. These things go to show that the aforesaid plea of the respondents with respect to the plea bargaining cannot be ruled out.

12. Then it is very clear that once it is found to be a case of plea bargaining then it is to be accepted that the respondents pleaded guilty, on the consideration that they were given to understand by the original

complainant, that if they pleaded guilty, the Court would let them free by imposing lighter punishment. What had actually happened between the respondents and the original complainant could not come on record of the Trial Court but the fact remains, that though there is a provision for minimum punishment the Trial Court has inflicted fine of meager amount of Rs.150/-. This shows that the aforesaid probability cannot be ruled out altogether. In aforesaid view of the matter, since there appears to be a case of plea bargaining it would not be in the fitness of things to straightaway impose minimum sentence on the respondents by allowing the appeal without giving an opportunity to the respondents to have a fresh trial from the stage of recording a plea before the Court concerned. If they do not plead guilty then the Trial Court would proceed according to law and the parties will be at liberty to lead evidence before the Court concerned and on appreciation thereof the Trial Court would dispose of the said two matters in accordance with law.

13. In the aforesaid view of the matter these two appeals of the State of Gujarat for enhancement of sentence, partly succeed and they are partly allowed. The impugned judgements and orders of conviction and sentence passed by the Trial Court are hereby quashed and set-aside. The fine, if paid, is directed to be refunded to the respondents concerned. Both the cases are remanded to the Trial Court for a fresh trial with a direction to dispose of the same on merit on priority basis according to law as expeditiously as possible and preferably within 4 months from the date of receipt of the order of this Court. Office shall forthwith transmit the R & P of these two matters to the Court concerned.

17.3.2001. (D.P. Buch, J).

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